In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 76-69

EDWARD WALSH, as Trustee in Bankruptcy for
PALMER DATA CORPORATION dba COMPUTERMINAL,
Petitioner,

VS.

UNITED STATES DISTRICT COURT, FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
Respondent,
BURROUGHS CORPORATION,
Respondent and Real Party in Interest.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The District Court has ordered an unprecedented fourth trial before any appeals. Should the Petitioner Walsh prevail again, the District Court promises to order a fifth trial. Therefore, the Petition must be granted if the Petitioner Walsh, a bankrupt estate, is ever to be released from the District Court. The only other alternative is if

Walsh, out of complete frustration, is forced into taking the preposterous position of seeking entry of judgment in favor of the antitrust violator in order to get an appeal.

Even though the alleged grounds for ordering the fourth trial (which are manifestly wrong) only concern the issues of causation and damages, the District Court, notwithstanding the two unanimous and similar verdicts of the two juries who heard the case in its entirety *and* the prior decision by the first District Judge who denied the Respondent Burroughs' motion for a new trial on the issue of liability, gratuitously observed that the overwhelming weight of the evidence on the issue of *liability* favored Burroughs. Because of that observation and because of the fact that the evidence on Burroughs' liability will be exactly the same in the fourth trial as it was in the first and third trials (the only times that liability evidence was presented to juries), it follows that yet another victory for the Petitioner Walsh will necessarily result in yet another new trial before any appeals and so on. Consequently, the fourth trial will be nothing more than a needless and meaningless act requiring additional time, money and effort by the Court, the parties, and what promises to be the next "advisory" jury. Notwithstanding this intolerable situation, Burroughs asserts that the "Petitioner seeks . . . this Court to tamper at a premature stage with the delicate machinery of trial by jury." (Res. Br., p. 11) To the contrary, the Petition challenging the unprecedented fourth trial before any appeals and the promise of a fifth is clearly not "premature." And whatever may be said about the "delicate machinery of trial by jury" in other cases, the record in

this case dramatically illustrates that that machinery has come to a grinding halt. And further, if there has been any "tampering" with that machinery, it has been done by the District Court in disregard of this Court's many decisions. As stated by this Court in its decision in *Tennat v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 at 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citations omitted). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Emphasis added).

The Respondent Burroughs claims that "the District Court acted within its sound discretion in invalidating the excessive verdict of an erroneously instructed jury and ordering a [fourth] new trial [before any appeals]." (Res. Br., p. 6). Burroughs fails to mention the fact that it did *not* even object to the so-called erroneous instruc-

tion. Nor does Burroughs mention that the verdict was *less* than one half of the damages in evidence. Nor does Burroughs advise this Court that the District Court's inexplicable statement that the $1,162,000 award was "grossly inflated on plaintiff's own testimony" (Appendix B to the Petition, p. 9) is undisputedly wrong. The simple fact of the matter is that the District Court, as best exemplified by the lower court's factual analysis to the jury given immediately after the extemporaneous instructions (Appendix to Appendix B to the Petition, pp. 28-43), disagreed with the ultimate factfinding by the jury and placed itself in a higher position of authority than the Constitution or the decisions by this Court permit.

CONCLUSION

For the reasons and authority stated, and based upon the extraordinary circumstances of this case, the Petitioner respectfully submits that the Petition should be granted so that this marathon litigation can be finally terminated.

Dated, September 3, 1976.

JOSEPH M. ALIOTO,
Attorney for Petitioner.